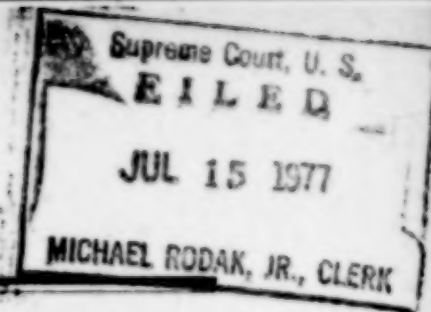


No. 76-1542



In the Supreme Court of the United States

OCTOBER TERM, 1977

ELLIOT LASKY, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

BENJAMIN R. CIVILETTI,
Assistant Attorney General,

JEROME M. FEIT,
HENRY WALKER,
*Attorneys,
Department of Justice,
Washington, D.C. 20530.*

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	1
Statement	2
Argument	3
Conclusion	10

CITATIONS

Cases:

<i>United States v. Agurs</i> , 427 U.S. 97	3
---	---

Statutes:

21 U.S.C. 952	2
21 U.S.C. 960	2
21 U.S.C. 963	2

Miscellaneous:

Federal Rules of Evidence, Rule 404(b)	9
--	---

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	1
Statement	2
Argument	3
Conclusion	10

CITATIONS

Cases:

<i>United States v. Agurs</i> , 427 U.S. 97	3
---	---

Statutes:

21 U.S.C. 952	2
21 U.S.C. 960	2
21 U.S.C. 963	2

Miscellaneous:

Federal Rules of Evidence, Rule 404(b)	9
--	---

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1542

ELLIOT LASKY, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-11) is reported at 548 F. 2d 835.

JURISDICTION

The judgment of the court of appeals was entered on January 5, 1977. A petition for rehearing was denied on March 8, 1977. Mr. Justice Rehnquist extended the time for filing a petition for a writ of certiorari to May 7, 1977, and the petition was filed on May 6, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the prosecution violated its constitutional duty of disclosure by failing to inform petitioner that a

prosecution witness, who testified that he had been convicted of smuggling cocaine, had also smuggled marijuana on two occasions.

2. Whether the trial court erred in finding that the government had not relied upon perjured testimony.

3. Whether petitioner was denied due process by the trial court's admission of evidence of his involvement in similar smuggling transactions, when this evidence was admitted solely to prove petitioner's knowledge and intent.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of California, petitioner was convicted of one count of importing cocaine and one count of conspiracy to import cocaine, in violation of 21 U.S.C. 952, 960, and 963.¹ He was sentenced to two concurrent seven-year terms of imprisonment, to be followed by a ten-year special parole term. The court of appeals affirmed (Pet. App. A).

The evidence at trial showed that petitioner helped to plan and finance a cocaine importation scheme in the fall of 1971. According to the testimony of two co-conspirators, Smith and Saytes, petitioner flew to Los Angeles, California, in October 1971, where, in Smith's apartment, he inspected some recently imported cocaine. He found that it was of poor quality; he said that he had a better source, and that they could cooperate on transportation of the drugs into the United States (Tr. 529-532). Petitioner then returned to New York, contacted Saytes, and provided him with money and a list

¹An earlier trial on the same charges ended in a mistrial because of a jury disagreement (Pet. App. A-4).

of contacts in Colombia from whom to buy cocaine (Tr. 298-299). Saytes flew to Colombia, discussed the cocaine purchases with petitioner's South American contacts, and returned to New York to report (Tr. 304-316). Based upon Saytes' report, petitioner gave him between \$6,000 and \$7,000 and sent him back to Colombia to buy as much cocaine as possible (Tr. 315-316). Once the cocaine was purchased, Saytes and other conspirators arranged for two couriers to smuggle the drugs across the United States border at San Ysidro, California. A United States customs inspector discovered the cocaine when the couriers attempted to cross the border (Tr. 325-328). Petitioner immediately flew to Los Angeles to discuss the situation with Saytes and other conspirators, and then returned to New York (Tr. 328-331).

The government also introduced evidence of three similar, subsequent cocaine smuggling transactions, which took place in January, May, and December of the following year. Petitioner admitted his involvement in the May 1972 scheme, for which he had pleaded guilty, and also said he had purchased cocaine on another occasion for his own use (Pet. App. A-7).

ARGUMENT

I. Petitioner contends that the government violated its constitutional duty of disclosure by failing to inform him that one of its witnesses, David Stutler, had made two trips to smuggle marijuana in addition to the cocaine smuggling episodes about which he testified (Pet. 8-15).

Constitutional error occurs when the government fails to disclose exculpatory evidence in response to a general request only "if the omitted evidence creates a reasonable doubt that did not otherwise exist." *United States v. Agurs*, 427 U.S. 97, 112. Petitioner made only a general

request for all *Brady* and *Giglio* material² (Pet. App. A-10 n. 2), and his claim is thus to be assessed under the foregoing standard. He asserts that the disclosure of David Stutler's marijuana smuggling, for which Stutler had not been prosecuted, would have reduced his credibility by providing a strong motive for cooperation with the government (Pet. 12-14).

The district court concluded that evidence of Stutler's two marijuana trips would not have affected the jury's verdict (Tr. 1298), and the court of appeals agreed, stating that "further evidence affecting David Stutler's credibility would not create a reasonable doubt that did not otherwise exist" (Pet. App. A-11; footnote omitted). Stutler's testimony did not directly link petitioner with the conspiracy charged in the indictment. Instead, his testimony about the subsequent December 1972 smuggling scheme was admitted only to prove petitioner's knowledge and intent in committing the acts charged in the indictment. Accordingly, the court instructed the jury that it could not consider evidence of subsequent smuggling transactions until it was convinced beyond a reasonable doubt that

²Petitioner also requested any information concerning recommendations to the Court for early release and agreements not to prosecute government witnesses (Pet. App. A-10 n. 2). Since no such agreement was made with Stutler, and indeed, since Stutler himself informed the government of the marijuana trips and did so after he had agreed to testify against petitioner, there was no connection between Stutler's testimony at trial and any agreement concerning the marijuana trips. See Tr. 1294-1295. Petitioner's assertion (Pet. 11) that defense counsel requested in open court that the defense be informed whether any government witnesses were involved in other illegal transactions takes this statement out of context. Counsel's statement was made in the context of explaining his request for all the transcripts of the testimony of government witnesses before the grand jury (Tr. 34-37).

petitioner had committed the acts charged.³ Moreover, on cross-examination petitioner's counsel explored the fact that Stutler had been convicted for smuggling cocaine and that his cooperation with the government could result in the reduction of his sentence, which was still subject to modification (Tr. 635).⁴

³The court instructed the jury as follows (Tr. 1158-1159):

During the course of the trial you have heard evidence of allegedly similar acts to those charged in the indictment on the part of the defendant Lasky. As I told you earlier, the defendant is not on trial here for those allegedly similar acts. Evidence that an act was done at one time or on one occasion is not any evidence or proof whatever that a similar act was done on another time or on another occasion. That is to say, evidence that a defendant may have committed a subsequent act of a like nature may not be considered by the jury in determining whether the accused committed any act charged in the indictment. Nor may any evidence of an alleged subsequent act of a like nature be considered for any other purpose whatever unless the jury first find that the other evidence in the case standing alone establishes beyond a reasonable doubt that the accused did the particular act charged in that particular count of the indictment then under consideration. If the jury should find beyond a reasonable doubt from the other evidence in the case that the accused did the act charged in the particular count then under deliberation then the jury may consider evidence as to an alleged subsequent act of a like nature in determining the state of mind or the intent with which the accused did the act charged in the particular count; and where proof of an alleged subsequent act of a like nature is established by evidence which is clear and conclusive, the jury may, but is not obliged to, draw an inference and find that in doing the act charged in the particular count under deliberation, the accused acted willfully and with specific intent and not because of mistake or accident or other innocent reason.

⁴As petitioner notes (Pet. 6-7), Stutler's sentence for cocaine smuggling was, in fact, reduced to time served on recommendation of the United States Attorney's office.

As the court of appeals concluded, "[o]ur review of the record reveals that the other testimony, standing alone, clearly and convincingly established the defendant's guilt" (Pet. App. A-11). Petitioner's contention that the jury might have reached a different verdict if it had known that Stutler, an admitted cocaine smuggler, had also been involved in smuggling marijuana, is insubstantial and affords no occasion to review the contrary finding of both courts below.

2. In the course of his argument on the government's failure to inform him about Stutler's marijuana smuggling, petitioner asserts that the government relied upon perjured testimony by Stutler (Pet. 10-15). Stutler testified that one Fred Chase had hired him to fly a shipment of Colombian cocaine from Mexico to the United States in December 1972, and that petitioner later gave Chase an envelope of money, from which Chase then paid Stutler for his part in the venture (Tr. 626-633). Stutler also testified about a later attempt to import cocaine, for which he had been convicted and was currently serving a prison term (Tr. 626, 633, 636-637). On cross-examination, petitioner's attorney questioned Stutler about his conviction (Tr. 636-637):

Q. And the trial in which Mr. Coffin asked you about was a trial where you attempted to smuggle twenty-two and a half pounds of cocaine into the United States. Is that right?

A. That's right.

Q. And you were arrested in—on an island near Columbia. Is that right?

A. Yes, that is right.

Q. And as a result of that arrest and the cocaine that was found in your airplane, you went to trial here in San Diego. Is that right?

A. Yes.

Q. How many other trips have you made besides that one?

A. The one that I am presently incarcerated on?

Q. Yes.

A. The one in question here, in 1972.

Q. So you only made two trips?

A. Yes.

At the time of Stutler's testimony, government's counsel knew that Stutler had also made two trips to import marijuana,⁵ and counsel brought this information to the court's attention after the jury retired.⁶

⁵The prosecutor's only information concerning these marijuana trips was volunteered by Stutler himself after he decided to cooperate with the government (see n. 2, *supra*).

⁶The government attorney, Mr. Coffin, explained to the court his reasons for the delay (Tr. 1194-1195):

MR. COFFIN: * * * I want to amplify what I said this morning. I had no indication then and I have no indication now that Mr. Stutler falsely answered that question. I don't know what Mr. Katz was referring to when he asked the question as to trips. I don't know how Mr. Stutler took the question, and I haven't talked to Mr. Stutler since then. I pointed it out to your Honor about the other, marijuana transactions, out of an overabundance of caution. I do not think that the information on marijuana trips was Brady material for several reasons: one, they are not connected at all to Mr. Lasky; two, what I interpret as Brady material is any benefit that Mr. Stutler might receive for testifying in the Lasky matter, and I just don't see how the marijuana transactions relate to any benefit he gets in testifying in the Lasky matter. Quite the contrary, I think that the man's sentence was 30 months, and it related to everything that he told us about that that

The record fully supports the district court's finding that Stutler did not commit perjury, since the questions were ambiguous, and he could reasonably interpret them, in context, as referring to cocaine trips, not all smuggling trips (Tr. 1298-1301):⁷

I'm satisfied that the questions were equivocal. I am satisfied that certainly Mr. Stutler could, in all truth and honesty, answer the questions the way that he did, and in the context in which the questions were asked * * * I have reviewed, as I say, those proceedings in their entirety, Mr. Katz [petitioner's attorney]. I do find them ambiguous, and I have no indication that Mr. Stutler testified falsely and certainly no indication that Mr. Coffin [the Government attorney] was aware of any perjury or any

would detract from the implication that Mr. Katz is trying to lay about him getting benefit for just testifying against Mr. Lasky; * * *

So, I can't say how Mr. Stutler took that question. In the context in which the question was asked, it was framed in the context of cocaine transactions, so I realize that, if at the time I had information that Stutler was lying, I would have brought it to the Court's attention, but I didn't have that information then. I don't have it now, and I'm only pointing it out to the Court out of an overabundance of caution because I have been thinking about it since then, and as I said, I verified this this morning with another attorney concerning Stutler's testimony in that regard about two marijuana transactions. I don't think it's relevant. I don't think it's Brady material. I don't think that he lied. I have no indication that Mr. Stutler lied, and in the framework of the questions, I just say that the answers should stand.

The district court, in ruling on the issue, made a point of praising the prosecutor's integrity and good faith in his handling of the entire matter (Tr. 1298-1301).

In fact, Stutler, according to his attorney, did understand the question to refer only to previous cocaine smuggling trips (Tr. 1289).

false testimony. I am also of the mind, as I was then, that it does relate to a collateral matter, that it was specifically not *Brady* material.

3. Petitioner's final contention is that he was denied due process by the admission of evidence regarding two similar cocaine transactions⁸ that occurred during the year following the transaction for which he was convicted (Pet. 16-20). Rule 404(b) of the Federal Rules of Evidence provides that evidence of other crimes, wrongs, or acts may be admitted for purposes such as "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." As noted above, the trial court admitted the evidence of the subsequent transactions to prove petitioner's state of mind and intent, and it so instructed the jury (Tr. 1158-1159). Since petitioner placed his intent at issue,⁹ the court of appeals correctly concluded that evidence of subsequent smuggling schemes "was clearly admissible to show the defendant's intent and state of mind" (Pet. App. A-6 n. 4).

⁸Petitioner may not complain that the prosecution introduced evidence concerning his arrest and conviction for smuggling cocaine in May 1972, since this incident was mentioned both in petitioner's opening statement to the jury and in his testimony on his own behalf (Tr. 270, 904).

⁹For example, petitioner testified that he gave Saytes the list of contacts in Colombia for social purposes, not as cocaine sources (Tr. 877-878), and testified that he met with the conspirators after the arrest of the couriers only in response to his friend's request for help (Tr. 897-899).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. McCREE, JR.,
Solicitor General.

BENJAMIN R. CIVILETTI,
Assistant Attorney General.

JEROME M. FEIT,
HENRY WALKER,
Attorneys.

JULY 1977.